

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re Petition of)	
)	
Mauna Kea Broadcasting Company,)	CSR-8658-M
Licensee of Television Station KLEI-DT)	Docket No. 12-167
Kailua-Kona, Hawaii)	
)	CSR-8682-M
v.)	Docket No. 12-197
)	
Time Warner Entertainment Company, L.P.,)	
d/b/a Oceanic Time Warner Cable,)	CSR-8686-A
and Hawaiian Telcom, Inc., d/b/a)	Docket No. 12-208
Hawaiian Telcom Services Company, Inc.)	

To: The Secretary
For: Chief, Media Bureau

**OPPOSITION OF
THE STATE OF HAWAII**

The State of Hawaii Department of Commerce and Consumer Affairs (“DCCA”)¹ respectfully submits its opposition to the petitions filed by Time Warner Cable. (“TWC”)² and Hawaiian Telcom Services Company, Inc. (“HTSC”)³ seeking reconsideration of the Bureau’s Order denying TWC’s petition to exclude Honolulu and the surrounding communities from

¹ These Comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs, Cable Television Division, which represents the state in these matters. The DCCA is the cable franchise authority for the State of Hawaii.

² Petition for Reconsideration of Time Warner Entertainment Company, L.P., Mauna Kea Broadcasting Company Kailua-Kona, Hawaii, CSR-8658-M and CSR-8682-M, Docket No. 12-167, CSR No. CSR-8686-A, Docket No. 12-208 (July 13, 2012) (“*TWC Petition for Reconsideration*”).

³ Petition for Reconsideration of Hawaiian Telcom Services Company, Inc., Mauna Kea Broadcasting Company Kailua-Kona, Hawaii, CSR-8658-M and CSR-8682-M, Docket No. 12-167, CSR No. CSR-8686-A, Docket No. 12-208 (Nov. 19, 2012) (“*HTSC Petition for Reconsideration*”).

station KLEI's Designated Market Area ("DMA").⁴ DCCA reiterates that such modifications would reduce diversity in broadcast programming, and may create harmful precedent limiting future opportunities for Oahu and other islands to benefit from a broadcaster that is not affiliated with a major network. The Bureau's Order gives effect to the concern of Congress, the Commission, and the State for the value of localism and properly considers the unique geographic and cultural factors present in Hawaii. DCCA therefore urges the Commission to deny the petitions for reconsideration and leave KLEI's DMA unchanged.

I. THE STATUTORY MARKET MODIFICATION ANALYSIS ENCOMPASSES BOTH ENUMERATED AND UNENUMERATED FACTORS

The petitions of TWC and HTSC quote the four statutory factors in Section 614(h)(1)(C)(ii) of the Cable Television Consumer Protection Act (the "Act")⁵ at length and repeatedly treat them as ends in themselves. TWC's petition refers throughout to what the statutory factors "require,"⁶ and HTSC asserts that the Commission "must consider" the four identified factors.⁷ Contrary to the analysis urged by TWC and HTSC, however, the statutory factors are not a checklist and the enumerated factors are not exclusive. Instead, the Commission is within its authority to include both enumerated and unenumerated factors in its analysis.⁸ The Commission may also give greater or lesser weight to factors based on the facts and

⁴ *Mauna Kea Broadcasting Company Kailua-Kona, Hawaii, CSR-8658-M and CSR-8682-M, Docket No. 12-167, CSR No. CSR-8686-A, Docket No. 12-208, Memorandum Opinion and Order, DA 12-1683 (rel. Oct. 19, 2012).*

⁵ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 614 (1992).

⁶ *See, e.g., TWC Petition for Reconsideration* at 3, 6, 12.

⁷ *See, e.g., HTSC Petition for Reconsideration* at 2.

⁸ *See WLNY-TV, Inc., et al. v. FCC*, 163 F. 3d 137, 145 (2d Cir. 1998), *aff'd In re: Market Modifications and the N.Y. Area of Dominant Influence*, 12 FCC Rcd 12262, 12268 (1997).

circumstances before it.⁹ The Commission has long held that “[t]he factors specified in Section 614(h) do not purport to be exclusive and thus other evidence may be considered that is helpful in defining the scope of the markets of the stations involved.”¹⁰

Indeed, the Petitioners’ overly narrow focus on the enumerated factors is contrary to the statutory language and intent. Although the TWC and HTSC petitions quote at length from Section 614(h)(1)(C)(ii) of the Act, they each omit the full statutory language, which provides the overarching justification for these factors: “the Commission shall afford particular attention to the value of localism by taking into account *such factors as* [the enumerated factors.]”¹¹ The concern of Congress for the value of localism is the ultimate driver of the Commission’s analysis, and the legislative history of the Act clarifies that “[t]hese factors are not intended to be exclusive, but *may* be used to demonstrate that a community is part of a particular station’s market.”¹² Attention to the value of localism is required, but the use or weight of particular analytical factors to realize this value is within the discretion of the Bureau based on the facts before it. The Bureau’s Order provides a reasoned analysis that engages with the relevant factors and gives effect to the statutory intent that concern for the value of localism—rather than rote adherence to discrete factors—is the primary driver of the Commission’s analysis. The Commission should therefore reject the claims to the contrary of TWC and HTSC and deny their petitions for reconsideration.

⁹ *North Texas CableVision, Ltd.*, 12 FCC Rcd 17528, 17533, ¶ 18 (CSB 1997).

¹⁰ *Petition of Comcast of Central New Jersey for Modification of Market of Television Station WFMZ-TV, Allentown, Pennsylvania, CSR 4934-A*, Memorandum Opinion and Order, DA 97-1191 (rel. Jun. 5, 1997).

¹¹ Cable Television Consumer Protection Act of 1992, Section 614(h)(1)(C)(ii), codified at 47 U.S.C. § 534(h)(1)(C) (*emphasis added*).

¹² H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992) (*emphasis added*).

II. THE UNIQUE GEOGRAPHIC AND CULTURAL FACTORS OF HAWAII ARE RELEVANT TO THE MARKET MODIFICATION ANALYSIS

In addition to the enumerated factors, the Bureau also considered in its analysis the impact of the unique geography and cultural identity of the Hawaiian Islands.¹³ The record provides strong support for the consideration of this factor. Comments filed by DCCA, the State Governor, the Lieutenant Governor, and others have explained that treating all of Hawaii as a unified market both reflects the shared cultural identity and promotes localism and valuable broadcast diversity.¹⁴ In addition, the Bureau noted that TWC has previously acknowledged that it “views the whole state as one system and provides the exact same service throughout the state”¹⁵ Likewise, HTSC has explained that “[t]he history, geography, geology and culture of Hawaii are unique among the fifty states” and that service issues in Hawaii “cannot be addressed by a one-size fits all approach.”¹⁶ These recognitions of the unity and uniqueness of Hawaii, and the policy implications thereof, continue to be true. Thus, the Bureau’s consideration of these circumstances, and their effect on the analysis of the other factors, was appropriate.

For instance, contrary to TWC’s argument, the Bureau did not “ignor[e] clear Commission precedent requiring that geographical considerations be taken into account.”¹⁷ In Hawaii, separations of many miles and vast bodies of water are not “logical limits to a station’s

¹³ *Order*, ¶ 12.

¹⁴ *See, e.g.*, Docket 12-208, *Comments of Governor Neil Abercrombie* (filed Aug. 16, 2012); *Comments of Brian Schatz* (filed Aug. 16, 2012); *Comments of State of Hawaii* (filed Aug. 16, 2012).

¹⁵ *Order*, ¶ 12 (*citing* Cable Advisory Committee, Department of Commerce and Consumer Affairs, State of Hawaii, Minutes of December 12, 2011 Meeting at §II(B), p.2).

¹⁶ *Reply Comments of Hawaiian Telcom, Inc., Rural Health Care Support Mechanism*, WT Docket No. 02-60 (filed Sep. 23, 2010).

¹⁷ *TWC Petition for Reconsideration* at 7.

natural market”¹⁸ but instead facts of life in an island state that the Bureau determined do not prevent frequent travel, economic exchange, or a long tradition of unity.¹⁹ The Bureau, relying on the extensive evidence in the record attesting to the unique isolation and shared cultural heritage of the islands, determined that geographical considerations did not, in the case of Hawaii, create insurmountable divisions in the natural economic market.

Additionally, the Bureau had ample support for its conclusion that KLEI’s programming is relevant to the communities in question.²⁰ The analysis that the “local programming cited by the station focused entirely on events, people, and places located on the Island of Hawaii”²¹ is factually inaccurate and ignores the clear signal from the government and franchise authority of the State that such programming *is* relevant to communities on other islands.²² The Bureau’s program-by-program analysis identified KLEI programming content relevant not only to the Island of Hawaii but also to the State as a whole, to other communities and interest groups, and to cultural subsets of the population such as the Native American, Native Hawaiians, Hispanic, and Filipino communities.²³

The Bureau’s Order therefore complied fully with the statutory requirements of Section 614(h)(1)(C)(ii) of the Act by adequately considering the four factors identified in the Act and by strictly adhering to the statutory dictate that the Commission shall afford particular attention to

¹⁸ *Id.*

¹⁹ *Order*, ¶ 12.

²⁰ *Id.*, ¶ 14.

²¹ *TWC Petition for Reconsideration* at 9; *see also HTSC Petition for Reconsideration* at 3-4.

²² *Supra* n.14

²³ *Order*, ¶ 9.

the value of localism. For these reasons, the petitions for reconsideration of TWC and HTSC must be denied.

III. THE BUREAU'S ANALYSIS IS CONSISTENT WITH THE FIRST AMENDMENT

TWC and HTSC also raise an argument under the First Amendment, asserting that the Bureau's reliance on KLEI's proffer of local programming is content-based and triggers strict scrutiny.²⁴ As the Petitioners acknowledge, however, the Commission has often included analysis of broadcast programming content in its market modification proceedings and such analysis has not been found to be inconsistent with the First Amendment.²⁵ Indeed, before turning to the First Amendment argument, the Petitioners argue that the Bureau's analysis of KLEI's programming was insufficiently granular as compared to previous market modification proceedings.²⁶ Thus, the Petitioners implicitly acknowledge a constitutionally appropriate and precedentially supported role for such content analysis in a market modification analysis.

Furthermore, the State and others have expressed the strong position that locally-produced Hawaiian programming of all types has relevance to the entire Hawaiian market, both to reflect and promote the historic unity of the islands.²⁷ As explained above in the discussion of the local service factor, this conclusion independently warrants a finding that KLEI's offerings have relevance to the greater Hawaiian community, including the communities at issue. Thus, the Bureau could have reached the conclusion that it did in its Order on the strength of the fact

²⁴ *TWC Petition for Reconsideration* at 18.

²⁵ *HTSC Petition for Reconsideration* at 5 (citing *Mountain Broadcasting Corporation*, 27 FCC Rcd 2231, ¶¶ 20-26 (MB 2012); *Tennessee Broadcasting Partners*, 23 FCC Rcd 3928, ¶¶ 22-37 (MB 2008) *aff'd on recon.*, 25 FCC Rcd 4857 (MB 2010)).

²⁶ *TWC Petition for Reconsideration* at 10; *HTSC Petition for Reconsideration* at 5.

²⁷ *Supra* n.14.

tha KLEI was providing programming of value to Hawaii as a whole, without consideration of the specific programming provided by KLEI to the community.

Finally, the Petitioners constitutional challenge is unavailing because, regardless of whether the Bureau’s analysis of the enumerated factors “place[s] any reliance on content-based judgments,”²⁸ the Bureau may easily cure any constitutional defect. Specifically, the Bureau could issue an order on reconsideration that reaches the same conclusion but relies solely on the fact that KLEI, in its role as a local, independent broadcast station in the uniquely isolated Hawaiian market, contributes to the “three interrelated, important governmental interests [of] (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the television programming market.”²⁹ Thus, even without a content-specific analysis, the Commission may rely on the recognition that preserving and promoting local broadcasters, irrespective of content, supports “the widest possible dissemination of information from diverse and antagonistic sources[, which] is essential to the welfare of the public” in such a remote DMA.³⁰ Such broadcasters provide valuable “outlets for community self-expression”³¹ and ensure the continuation of “the local origination of [broadcast] programming”³² which could be jeopardized by adverse market modification decisions. This focus on the station as a local

²⁸ *TWC Petition for Reconsideration* at 18.

²⁹ *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997) (“*Turner II*”) (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622 (“*Turner*”)).

³⁰ *Turner II*, 520 U.S. at 192 (citing *Turner*, 512 U.S., at 663–664 (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668, n.27 (1972) (plurality opinion) (“*Midwest Video*”), in turn quoting *Associated Press v. United States*, 326 U. S. 1, 20 (1945)).

³¹ *Turner II*, 520 U.S. at 192–193 (quoting *Midwest Video* 406 U.S. at 667–668 (plurality opinion).

³² *Act*, § 2(a)(10); note following 47 USC § 521.


originator of programming and contributor to a healthy multiplicity of sources is content neutral and fully consistent with Congressional goals and the First Amendment. For these reasons, the constitutional challenge is unavailing and the petitions for reconsideration must be dismissed.

IV. CONCLUSION

DCCA is committed to promoting Hawaii viewers' access to diverse and locally-produced programming. The Order gives effect to the statutorily-recognized value of localism, as well as the policies of the Commission and the State, by considering both statutorily enumerated factors and the important geographic and cultural context of the Hawaiian market. Exclusion of KLEI would run counter to these principles and would contract rather than expand local program offerings available to Honolulu audiences. DCCA therefore urges the Commission to deny the petitions for reconsideration and to leave the DMA of station KLEI-TV unmodified.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Preston N. Thomas, hereby certify that on this 4th day of December, 2012, I caused copies of the foregoing “Opposition of the State of Hawaii” to be placed in the U.S. Postal Service, first class postage prepaid, addressed to the following persons:

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